82-130
NO.

Office - Supreme Court, U.S.
FILED
OCT 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALONZO W. LAWRENCE and JAMES SIMPSON,

Petitioners,

vs.

BAUER PUBLISHING & PRINTING LTD., a corporation, KURT CHRISTOPHER BAUER, JEFFREY LANCE BAUER and PATSY BONTEMPO,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Statement

Plaintiffs, Alonzo W. Lawrence and James Simpson brought this action for libel against defendants, Bauer Publishing and Printing, Ltd., a corporation, Kurt Christopher Bauer (editor and publisher), Jeffrey Lance Bauer (minor-

ity stockholder), Patsy Bontempo (reporter) and "John Doe" (fictional). The action is founded upon articles which appeared in the Rahway News Record on January 9, 1975 and April 17, 1975 (Pa67 and 106). The matter was tried with a jury on October 11, 15 and 16, 1979, in the Superior Court of New Jersey, Law Division, Union County. At the conclusion of the presentation of evidence, the trial judge ruled the plaintiff Alonzo Lawrence to have been a public figure. There being no evidence of actual malice, the court also granted a judgment of dismissal with respect to the claims of Lawrence. The Simpson case went to the jury, ultimately resulting in a verdict of $22,500.

Post-trial motions were made by both parties. The trial judge reversed himself with respect to the Lawrence case and granted a new trial. Defendants' motions attacking the Simpson verdict were denied.

Defendants' motion for leave to file an interlocutory appeal with respect to both cases, was granted by the Superior Court, Appellate Division, but the Appellate Division affirmed the trial court in all respects, 176 N.J. Super. 378 (App. Div. 1981). A motion by defendants for leave to appeal was granted by the Supreme Court of New Jersey. That court ruled, *inter alia*, that both Lawrence and Simpson were public figures as a matter of law. The Court also found there was insufficient evidence of actual malice by defendants, and directed that a judgment be entered in favor of defendants with respect to both plaintiffs.

Plaintiffs now petition this Court for a Writ of Certiorari citing abridgement of the freedom of speech and denial of due process as the constitutional basis for the Court's jurisdiction.

The issues raised by plaintiffs concern the Supreme Court of New Jersey's determination that the plaintiffs were public figures and the absence of actual malice by defendants.

The Facts

The underlying episode which gave rise to the alleged libel in this case was a dispute over whether the City of Rahway, New Jersey was in need of a new fire house. The plaintiffs, Lawrence as President and Simpson as Vice-President of the Rahway Taxpayer's Association mounted a concerted effort to arouse public opinion against the construction of the fire house. In order to have the matter placed on a public referendum, plaintiffs led the drive for a petition to that effect. The Taxpayer's Association collected approximately 5,000 signatures. The defendant newspaper received information from a usually reliable source that an investigation was being conducted into certain suspected "irregularities" among the signatures. The source, Joseph Hartnett, was the business administrator for the City of Rahway.[1] He testified that his review of the petitions revealed many signatures to appear to be in the same handwriting, including petitions attested to be Lawrence and Simpson.

As a result of discussions with the Mayor, the petitions were referred to the Municipal Prosecutor for investigation. After the Municipal Prosecutor reported back to Mr. Hartnett and the Mayor, it was agreed to have the County Prosecutor look into the matter.

Mr. Hartnett advised the defendant newspapers when the matter was referred to the Municipal Prosecutor, speaking with the defendant Kurt Bauer (publisher and editor) and the defendant Patsy Bontempo (reporter). Within few days of this conversation, the January 9, 1975 article

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[1] Mr. Hartnett was added as a defendant by an amended complaint, but the claim was held to be barred by a one year Statute of Limitations in an earlier Appeal. 78 N.J. 371 (1979), reversing 154 N.J. Super. 271 (App. Div. 1977).

appeared (Pa67). The article mentioned the investigation which was to take place and further stated that false swearing or forgery charges could result from the investigation. Hartnett testified that he told defendants ". . . the city administration is alleging that there are forgeries and false swearing of oaths in connection with these petitions . . ."

After publication of the January 9, 1975 article, Lawrence and Simpson demanded a retraction. Before making further comment, defendant Kurt Bauer spoke again to Mr. Hartnett who confirmed the truthfulness of his earlier statement. He also spoke to the Municipal Prosecutor who confirmed that he had conducted an investigation and referred the matter to the County Prosecutor.

On April 17, 1975, the defendant paper published an additional article (Pa 106), wherein it noted the demand for a retraction, restated the information it had been given, and took pains to emphasize that there was no contention that the plaintiffs were *guilty* of any wrong doing. The article said,

> The News-Record did not and does not seek to harm Messrs. Lawrence and Simpson or to in anyway injure their good names. The pair of their own choosing publicly associated themselves and their organization with the petitions

Both Lawrence and Simpson were generally active in public affairs in Rahway, and at the forefront of the opposition to the fire house in that controversy. The evidence showed they regularly attended meetings of the City Council. Lawrence had attended every meeting of the Council for years and was on a list of people to be notified for special meetings. He often expressed

opinions on matters of public interest both at Council meetings and in letters to the editors of different newspapers. As President of the Taxpayer's Association, he led the fight against construction of the fire house. Much of the information in the article of January 9, 1975, was based on a press release he had given to the dedefendant newspaper. He was a founder of the Taxyayer's Association and was its spokesman on many issues at public meetings.

Similarly, Mr. Simpson had been a member of the Taxpayer's Association from its inception. He was its Vice-President at the time of this controversy, and served for years as its Treasurer. He attended Council meetings regularly and spoke at them. He also wrote letters to the editors of newspapers for publication. He also wrote press releases for the media on various issues. Mr. Simpson recalled that he had collected 10 or 11 sheets of signatures with 25 names on each for the petition. Significantly, Simpson had telephoned the defendant newspaper on the day the petitions were to be turned over to the city clerk requesting a photographer be present to record the turning over of the petitions. This was done and the photograph appeared on the front page of the newspaper.

Both Lawrence and Simpson were individual plaintiffs in a law suit brought against the City of Rahway regarding the firehouse.

ARGUMENT

POINT I

The Supreme Court of New Jersey adhered strictly to standards set by the United States Supreme Court in determining that both plaintiffs were public figures, and a writ of certiorari should not issue.

The determination of whether plaintiffs were "public figures" for purposes of the law of defamation must be made under the standards of *Gertz* v. *Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 61 L. Ed. 2d 411 (1974). The New Jersey Supreme Court found that plaintiffs were not "public figures for all purposes" *Lawrence* v. *Bauer Pubilshing and Printing Ltd.*, 89 N.J. 451, at 463 (1982). That is, they did not ". . . achieve such pervasive fame or notoriety that . . . [they became] . . . public figure[s] for all purposes and in all contexts." *Gertz*, however, confers public figure status on one who

> . . . voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.

It was against this standard that the New Jersey Supreme Court determined both plaintiffs to have been public figures.

Indeed, it is difficult to imagine that these plaintiffs could be found anything but public figures, as they so clearly, prominently, and voluntarily did inject themselves into the vortex of a public issue. The New Jersey Supreme Court carefully catalogued the evidence that both plaintiffs had done so, 89 N.J. at 463 to 465. While plaintiff Simpson's involvement was not quite so prominent as that of plain-

tiff Lawrence, the Court properly found that his role was not to be measured against that of Lawrence, but in the context of his involvement in the matter as a whole. Simpson's desire to be in the forefront of the public issue is highlighted by the evidence that he telephoned the defendant newspaper to request that they have a photographer present to photograph him and others turning over the petitions for filing.

Plaintiffs' petition concedes that the plaintiffs are to be judged as those who voluntarily placed themselves in the public eye. Their argument recognizes their position as distinct from those who unwillingly achieve prominence because of publicity surrounding a particular issue. See e.g., *Wolfston* v. *Reader's Digest Ass'n Inc.*, 433 U.S. 157, 61 L. Ed. 2d 450 (1979) and *Hutchinson* v. *Proxmire*, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979). Plaintiffs argue that their case affords the Court an opportunity to pronounce more explicit guidelines for the determination of public figure status for those who voluntarily inject themselves into a controversy.

However, as pointed out by the New Jersey Supreme Court,

> *Gertz* refrains from establishing specific criteria against which a plaintiff's status can be measured to determine whether or not he is a public figure. Rather in instances where the plaintiff is not a public figure for all purposes, *Gertz* calls for a case-by-case examination looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation, 418 U.S. at 352, 41 L. Ed. 2d at 812 (89 N.J. at 463).

In deciding that plaintiffs were public figures as a matter of law, the New Jersey Supreme Court properly

exercised the function of evaluating the plaintiff's involvement in the criteria. There is no conflict between *Gerts* and the decision of the New Jersey Supreme Court in this case. Defendants respectfully urge that plaintiff's petition for a writ of certiorari should be denied.

POINT II

The Supreme Court of New Jersey properly determined that the evidence could not give rise to a finding of actual malice on the part of defendant, and a writ for certiorari should not issue.

Petitioners also seek certiorari on the grounds that the New Jersey Supreme Court erred in finding the evidence insufficient to establish actual malice by defendants in publication of the alleged libel.

A finding that plaintiffs were public figures would bar their recovery unless they could show

> . . . on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

Gerts v. *Welch*, 418 U.S. 323 to 343, 94 S. Ct. 2997 at 3008, 41 L. Ed. 789 (1974). The New Jersey Supreme Court concluded that the evidence did not establish either knowledge of falsity or reckless disregard of truth as those phrases find meaning in *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) and *St. Amant* v. *Thompson*, 390 U.S. 727, 20 L. Ed. 2d 262 (1968).

Contrary to petitioners' assertion that the New Jersey Supreme Court failed to examine ". . . the evidence to see whether or not there is substantial evidence to send the

matter to the jury on the question of actual malice . . ." (pg. 51), the opinion states

> . . . we have carefully examined the record below to determine whether the evidence at trial was sufficient to present a jury question as to actual malice. The evidence reveals that there was insufficient evidence of actual malice toward either plaintiff (89 N.J. at 467)

Therefore, the Court did not assume the role of fact finder as petitioners contend, but exercised its traditional function of determining whether the evidence was sufficient for jury consideration as a matter of law.

The New Jersey Supreme Court correctly applied the standard set forth in *St. Amant* v. *Thompson*, 390 U.S. 727, 20 L. Ed. 262 (1968) in evaluating the evidence of actual malice. As both *St. Amant* and the New Jersey Supreme Court point out, it is evidence of one's state of certainty in making utterances that has relevance. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant, supra*, 390 U.S. 727 at 731, 88 S. Ct. at 1325, 20 L. Ed. 2d at 267. To the contrary, defendants testified that they believed what was told them was true, and took pains to verify that it was. After publication of the first article, they again spoke to their source, Mr. Hartnett, and to the Municipal Prosecutor as well. There was no evidence that defendants' doubted or had reason to doubt the truth of the contents of their articles.

Conceding that defendants may have been "careless" or "irresponsible," (89 N.J. at 468) the New Jersey Supreme Court nonetheless concluded that ". . . defendants honestly believed that the concededly misleading state-

ments published in the two articles were true." 89 N.J. at 467. The Court thus found there was no evidence of doubt in the mind of defendants concerning the truth of what was printed. Given that, a finding of actual malice was not possible.

Petitioners urge certiorari should be granted to give the Supreme Court an opportunity to set further guidelines for the States with respect to the issues of "public figures" and "actual malice." A reading of *Gerts, supra,* indicates the Court has given thorough consideration to balancing the interests of individuals and the States. *Gerts* leaves with the States greater latitude in defining defamation liability to private individuals (94 S. Ct. at 3010) but emphatically defines the standards applicable to public figures. Recognizing that public figures may sometimes be left without redress, the Court concludes that such a result is necessary to guarantee freedom of the press, especially in view of the ". . . limited state interest present in the context of libel actions brought by public persons." 94 S. Ct. at 3008.

CONCLUSION

Based on the foregoing, Respondents urge that the petition for writ of certiorari be denied.

September 28, 1982

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